No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Amicus Curiae Brief Of Institute For Justice, Owners Counsel of America, and Professor Daniel R. Mandelker, Supporting Petitioner

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Amar, Akhil Reed, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988) 7

Delaney, John & Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*, 31 Urb. Law. 195 (1999)..... 16

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Mandelker, Daniel R., & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law & Zoning Digest, No. 1, p. 3 (Jan. 1990) 3

Mandelker, Daniel R., Land Use Law, § 2.24 at 2-32 (5th ed. 2003)..... 16

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Stein, Gregory M., *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (1995) 16

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INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioner,[1] seeking reversal of the "ripeness" requirement in *Williamson County Regional Planning Agency v. Hamilton Bank*, 473 U.S. 172 (1985) that compels property owners seeking compensation for regulatory takings to sue (and lose) in state court before being able to seek relief in federal court. The cruel reality is that such relief in federal court is never available under this formula.

The Institute for Justice (IJ) is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of IJ is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

IJ is also committed to the idea that the protection of individual rights requires an engaged federal judiciary that stands ready to defend those

[1] Counsel for the *amici curiae* authored this brief alone and no other person or entity other than the *amici curiae*, its members or counsel have made a monetary contribution to the preparation or submission of this brief. Both the Petitioner and the Respondents consented to the filing of this brief by stipulations filed with the Court. The *amici curiae* timely notified counsel for the parties that we intended to file this brief.

rights when they are infringed. For too long, however, the doors of federal courts have been all but closed to property owners seeking to vindicate their Fifth Amendment rights. While, in every other area that IJ litigates, violation of a federal constitutional right entitles (and should entitle) a citizen to a federal constitutional remedy, property owners are routinely denied access to a federal forum for regulatory takings.

Owners Counsel of America (OCA) is a non-profit organization sustained by its members. OCA brings unique experience as a network of the most experienced eminent domain and property rights attorneys from across the country seeking to preserve, defend, and advance the rights of private property owners. OCA agrees that the freedom to own and use private property is "the guardian of every other right" and the basis of a free society. See James W. Ely, *The Guardian Of Every Other Right: A Constitutional History Of Property Rights* (2d ed. 1998)). OCA leverages its members' combined knowledge and experience in the defense of private property ownership in an effort to make the right to own private property available and effective to all property owners nationwide. OCA member attorneys have litigated landmark cases in almost all fifty states and many have been counsel of record for a party or amicus in eminent domain and takings cases that this Court has considered in the past forty years. OCA members author treatises, books, and articles on takings including chapters in the seminal treatise *Nichols On Eminent Domain*. Many of them serve as adjunct faculty at law schools in all parts of the country, teaching courses

in takings, land use, zoning, and property law in general.

Professor Daniel R. Mandelker is the Howard A. Stamper Professor of Law at Washington University in St. Louis. One of the country's leading scholars in land use law, he is the co-author of *Planning And Control Of Land Development*, now in its ninth edition, *Land Use Law*, *Federal Land Use Law*, and *Nepa Law And Litigation*, to name only a few of his current works. An active scholar in the field, Prof. Mandelker has studied and lectured about all aspects of land law for nearly 70 years, teaching courses in constitutional law, land use law, state and local government law and environmental law. He has long been a critic of the *Williamson County* ripeness rule, having long ago co-authored an article entitled Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law & Zoning Digest, No. 1, p. 3 (Jan. 1990). Having written that article nearly 30 years ago, Prof. Mandelker has remained interested in eradicating what he sees as a serious error in constitutional interpretation that keeps federal constitutional cases from being litigated on their merits in federal courts.

INTRODUCTION

This brief is filed on behalf of a broad amicus coalition to demonstrate the widespread agreement of practitioners, public interest organizations, and academics that experience with the formula

established in *Williamson County* in 1985 for determining ripeness in regulatory taking cases has been an abject failure at all levels. Thus, the amici joined in this brief consist of a non-profit public interest organization dedicated to the advancement of the rights of individuals — the Institute for Justice; a national organization of practicing lawyers who represent property owners in constitutional (i.e., takings and eminent domain) litigation — Owners Counsel of America; and one of the Nation's leading land use law scholars who has studied, taught, and written numerous books and articles about all phases of land use law for nearly 70 years — Professor Daniel R. Mandelker of Washington University in St. Louis. They are filing this brief together to help the Court understand the breadth and depth of the practical and jurisprudential issues raised by *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985) as seen from their varying perspectives and the reasons why allowing state courts to act as gatekeepers barring entry to federal courts on this fundamental federal constitutional issue is as legally wrong as it is pragmatically unnecessary.

SUMMARY OF ARGUMENT

1. Both *Williamson County* and this case were brought under the Federal Civil Rights Act, 42 U.S.C. § 1983. Such cases are probably the worst cases in which to inject a state court litigation requirement. As this Court has held, the point of section 1983 was to "interpose the federal courts *between the States and the people*, as

guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (emphasis added). There is no room in that formulation for a rule that interposes the state courts as a bar to federal court access.

2. Deferring to state courts is tantamount to granting states a veto over access to federal courts, making them de facto federal court gatekeepers. This is contrary to settled precepts. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Felder v. Casey*, 487 U.S. 131, 144 (1988).

3. It is time for the Court to reconsider — and reject — *Williamson County*'s state court litigation requirement, which demands state court confirmation that there is no state remedy for a governmental taking of property before allowing a Fifth Amendment claim to be held "ripe" for federal court litigation. The premise of that rule goes beyond both the language and meaning of the Fifth Amendment. A municipality's taking of private property without just compensation is complete *when* property is taken and compensation is not paid *by the government agency taking the action*. It does not require any judicial determination to complete, or ripen, the taking. And, if it did, there is no reason why such a determination must take place in state court.

ARGUMENT

The core issue in this case is one that has caused confusion and injustice since this Court's decision in *Williamson County*. The issue is whether property owners claiming that government action has taken their property without just compensation in violation of the Fifth Amendment to the U.S. Constitution have the right — like other constitutional claimants — to have their cases decided on the merits in federal courts.

As the Court held, for example, in *Bell v. Hood*, 327 U.S. 678, 681–82 (1946), a complaint seeking compensation for violation of the Fourth and Fifth Amendments belongs in federal court *if the plaintiff so chooses*. If, as the Court plainly held in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1992), property rights are not to be some "poor relation" among the guarantees in the Bill of Rights, then the anomalous refusal to permit federal litigation of regulatory takings claims needs to end.

I.

THE U.S. CONSTITUTION PROVIDES A FLOOR OF PROTECTION. STATES CANNOT PROVIDE LESS

The point of our Constitution in general — and its Bill of Rights, in particular — is to provide a baseline of minimal protection to all the rights of all citizens, with individual states having the discretion to provide *more, but never less* protection. *West Virginia State Board of Educ. v. Barnette*, 319

U.S. 624, 637–8 (1943). If there is a role for state courts and state laws, this is it: providing *more* protection than the U.S. Constitution mandates.

As Professor Akhil Amar summarized it, "the federal constitution stands as a secure political safety net—*a floor below which state law may not fall.*"[2] Any conflicting state law is simply "without effect."[3] In other words, as the Court classically held in *Marbury v. Madison*,[4] it is the Court's job to see that other levels of government remain true to the Constitution. That would include protecting the rights of property owners from the depredations of state and local government. Here, that is done by enforcing the will of Congress to provide protection against state agencies and officials, regardless of what state law might otherwise say. U.S. Const. art. VI, cl. 2.

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[2] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988) (emphasis added). See also Gideon Kanner, *Just How Just is Just Compensation?* 48 Notre Dame L. Rev. 786, 784 (1973) ("[I]t seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa.")

[3] *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[4] 5 U.S. (1 Cranch) 137, 177 (1803).

II.

STATE COURTS CANNOT SERVE AS GATEKEEPERS, BLOCKING THE ENTRY OF PROPERTY OWNERS TO FEDERAL COURTS

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them de facto federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Felder v. Casey*, 487 U.S. 131, 144 (1988).

Indeed, to relegate Section 1983 suits to control by state courts (as *Williamson County* does with respect to regulatory takings) is to ignore the entire history of the statute. As the Court summarized in *Felder*, 487 U.S. at 147:

> Congress enacted § 1983 in response to widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers.

How ironic that property owners in regulatory taking cases find themselves shunted right back to the very courts that Congress intended to shield them from.

"[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors[,]" *Felder*, 487 U.S. at 141, *by "interpos[ing] the federal courts between the States and the people*, as guardians of the people's federal rights[.]" *Mitchum*, 407 U.S. at 242 (emphasis added).

To effectuate those goals, Congress intended to "*throw open the doors of the United States courts*" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts . . .*" *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 504 (1982) (emphasis added).

Far from being "thrown open," the federal courthouse doors have been slammed shut to regulatory taking victims since *Williamson County* was decided more than 30 years ago.

Put another way, section 1983 is one of the most consequential laws passed by Congress. It was enacted to enforce the protections intended by the Fourteenth Amendment.[5] Its goal was a significant restructuring of the relationship between the citizens of the states and the local and state officials in those states, with the courts of the United States acting as guarantors of federal rights. See *Mitchum*, 407 U.S. at 238-39. In other

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[5] Section 5 of that Constitutional provision granted Congress "the power to enforce, by appropriate legislation, the provisions of this article."

words, the "dominant characteristic" of such actions is that "they belong in court." *Burnett v. Grattan*, 468 U.S.42, 50 (1984). And, by that, the Court plainly intended to focus on "belong[ing]" in *federal* court, because it emphasized that the judicial remedy exists "independent of *any other* legal or administrative relief that may be available as a matter or federal *or state law.* They are judicially enforceable in the first instance." *Ibid.* (emphasis added).

In the Court's stirring words:

> "We yet like to believe that *wherever the Federal courts sit*, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction simply because the rights asserted *may be adjudicated in some other forum.*"

McNeese v Board of Education, 373 U.S. 668, 674, n.6 (1963) (emphases added) (quoting with approval *Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan. 1945), *appeal dismissed pursuant to stipulation* 326 U.S. 690).

To those who have found their property rights regulated into near or total valuelessness since *Williamson County*, the Court's words ring hollow. They need to have life breathed back into them by overruling *Williamson County* and once again "throw[ing] open the doors of the United States

courts" for "immediate access" as envisioned in *Patsy*, 467 U.S. at 504.)

This theory of protecting *federal* rights in *federal* courts dates to the founding of the Republic (i.e., it predates adoption of either the Fourteenth Amendment or Section 1983), and makes clear why *Williamson County* is historically and doctrinally mistaken. As James Madison bluntly put it, ". . . a review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws." 1 Ann. Cong. 813, *quoted in Greenwood v. Peacock*, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-348 (1816); *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 87 (1809).

Williamson County's state court litigation mandate inverted this basic building block of 42 U.S.C. § 1983: it interposed state courts to shield municipalities from federal accountability. Having watched lower courts and local governments experiment with that wrong-headed view of the law, it is time for this Court to set things right.

Indeed, any requirement to file an unsuccessful suit to establish that there is no remedy under state law would contravene not only Section 1983, but subsequent Congressional action as well. Since adopting Section 1983, Congress has clearly reinforced the need for strongly enforcing that bedrock civil rights law. Any required suit for

payment would be contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the days when government could simply grab property first and then say "sue me" to the aggrieved owner are over. Cf. *Stringer v. United States*, 471 F.2d 381, 384 (9th Cir. 1973); *United States v. Herrero*, 416 F.2d 945, 947 (9th Cir. 1969). That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation. Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651(1)) or, failing that, condemnation (42 U.S.C. § 4651(8)).[6]

Moreover, mandating suit in state court adds to the Fifth Amendment a remedial requirement contrary to its plain words. The just compensation language has repeatedly been read by this Court as a limitation on government's power (i.e., that the power of eminent domain is subject to two preconditions — public use and just compensation). It is not an invitation for an injured property owner

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[6] The Act provides succinctly: "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." 42 U.S.C. § 4651(8). To make this a truly "uniform" law, as its title advertised, the policies in section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. 42 U.S.C. § 4655.

to sue for payment, as the Relocation Act now makes clear. That is why the Court has held the Just Compensation Clause to be self-executing. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

In any event, if suit is required to demonstrate the actuality of a Fifth Amendment violation, there is nothing in the Fifth Amendment directing that the only place to seek that determination is in state court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff. *Bell*, 327 U.S. at 681 ("the party who brings a suit is master to decide what law he will rely upon").

III.

THE WHOLE POINT OF 42 U.S.C. § 1983 WAS TO PROVIDE FEDERAL COURTS FOR THE PROTECTION OF FEDERAL RIGHTS

Section 1983 has been before the Court on many occasions and has been oft-explained. As the Court has repeatedly stressed, a Section 1983 case is a "species of tort liability" (*Heck v. Humphrey*, 512 U.S. 477, 483 (1994)), specifically, a statutorily created "constitutional tort" (*Jefferson v. City of Tarrant*, 522 U.S. 75, 79 (1997)) that sweeps within its ambit all manner of governmental actions that defy Bill of Rights protections. Section 1983 was intended by Congress to expose municipalities and local officials to "a new form of liability." *City of*

Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981). Properly so.

"The very purpose of § 1983 was to . . . *protect* the people from unconstitutional action *under color of state law*, whether that action be executive, legislative, or judicial." *Patsy*, 457 U.S. at 503 (emphases added; quotation marks omitted). This was not the sole purpose, however. Another important purpose was "to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). This form of liability "runs only against a specific class of defendants: government bodies and their officials." *Felder*, 487 U.S. at 141. In other words, it was Congress' judgment "that all persons who violate federal rights while acting *under color of state law* shall be held liable for damages" (*Haywood v. Drown*, 556 U.S. 729, 737 (2009)) and that all "persons injured by deprivation of federal rights and . . . abuses of power by those acting under color of state law" would be compensated. *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978).

Section 1983 was intended to provide "a uniquely ***federal*** remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (quotation marks omitted)) "read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (*Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)) so that individuals in a wide variety of factual situations

are able to obtain a ***federal*** remedy when their ***federally*** protected rights are abridged. See *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

While read against the general common law tort background, "[t]he coverage of [§ 1983] is . . . broader " (*Kalina v. Fletcher*, 522 U.S. 118 (1997)), and must be broadly and liberally construed to achieve its goals. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

In other words, the purpose of Congress "is the ultimate touchstone" of any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation marks omitted). Anything "incompatible with the compensatory goals of the federal legislation . . ." cannot stand. *Felder*, 487 U.S. at 143. The question, in other words, is whether state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971). Allowing states to erect any obstacles to federal court access violates this precept.

A state law, regardless of its intent, cannot "thwart the congressional remedy" or subvert Congress' clear goals in following its mandate to enforce the rights created and protected by the 14th Amendment. *Felder*, 487 U.S. at 139 (citing *Martinez v. California*, 444 U.S. 277, 284 (1980)). The courts have not hesitated to strike down state policies that do so. See *Haywood*, 556 U.S. at 739 ("A jurisdictional rule cannot be used as a device to

undermine federal law, no matter how evenhanded it may appear"); *Felder*, 487 U.S. at 153 (striking down state notice of claim statute). That is why the Court warned expressly that the rights of property owners need to be protected by the judiciary against the "cleverness and imagination" of state government word games. *Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 (1987).

IV.

STATE COURTS POSSESS NO MAGICAL ABILITY TO APPLY LOCAL LAW THAT ALLOWS THEM TO EVADE FEDERAL COURT PROTECTION OF FEDERAL RIGHTS

Regulatory takings are the only constitutional rights subjected to a *Williamson County*-like ripening. That property owners have been singled out is clear.[7] As one commentator concluded, "[t]he state compensation portion of [*Williamson County*]

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[7] See, e.g., Daniel R. Mandelker, *Land Use Law*, § 2.24 at 2-32 (5th ed. 2003) ("The Supreme Court has adopted a special set of ripeness rules to determine whether federal courts can hear land use cases."); John Delaney & Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*, 31 Urb. Law. 195, 196 (1999) ("the ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims").

finds no parallel in the ripeness cases from other areas of the law."[8]

No parallel, indeed.

There are two possible bases on which such discrimination might rest. First, as property law is generally based on the customs and practices of localities, it might be thought that the courts that are closest to the action would be more familiar with and thus better able to apply the law. Second, some misguided aspect of federalism might create the belief that each state should be responsible for its own law. Neither holds water.

First, and somewhat paradoxically in light of this theory, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the 5th Amendment's Just Compensation Clause. Federal court 1st Amendment cases abound, for example, in which the validity of local land use ordinances regulating or zoning for (or against) sexually explicit work has been challenged.[9] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases — and, indeed, as does any regulatory taking case. Cases are thus decided in

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[8] Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 (1995).

[9] E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

federal court, based on local "community standards," without initial state court suits.[10] But state court judges do not have a monopoly on measuring the works against those local standards.

Nor have federal judges shown any hesitation to embroil themselves in local issues invoking the kind of neighborhood and family values typically involved in regulatory taking cases. In a celebrated zoning case, this Court concluded that:

> [a] quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

The Court of Appeals in that case had "start[ed] by examin[ing]" the zoning ordinance with reference to "the interest of the local community in the protection and maintenance of the prevailing

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[10] Similarly, whether an artistic or literary work is obscene under the 1st Amendment is determined by "contemporary community standards" and "applicable state law." Miller v. California, 413 U.S. 15, 24 (1973).

traditional family pattern . . . ." *Boraas v. Village of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973).

Even after *Williamson County*, federal courts have relied on *Belle Terre* as authority for measuring zoning laws against the blessings of wide yards and peaceful neighborhoods, with no concern that they should not be adjudicating issues of state law. See, e.g., *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002). If it is acceptable for federal courts to examine such intensely local and personal issues in the context of zoning validity and proposed development, it cannot become unacceptable when a landowner wants to challenge regulatory restrictions on constitutional grounds.

First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance, even though they all involve intensely local issues.[11]

As this Court itself has noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to

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[11] E.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

issue bonds without a referendum, and a host of others.[12]

Many of the cited cases deal with parallel features of the Bill of Rights, notably the Due Process Clause, routinely protected in federal court through 42 U.S.C. § 1983—even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all aspects of the Bill of Rights—except the 5th Amendment's Just Compensation Clause.

Equally important, this Court itself has already recognized that federal regulatory taking cases can be tried in federal court *without first being tried in state court.* In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner filed suit in state court, as instructed by *Williamson County.* But the city was not satisfied with that venue and, invoking 28 U.S.C. § 1441(a), removed the case to federal court before any substantive proceedings could be had in state court under state law and the Court upheld removal. 522 U.S. at 174. Thus, the state law issues remained unresolved at either the time the matter was removed or this Court affirmed the removal. In other words, the Court saw nothing untoward in trying the case in federal court, with

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[12] *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-92 (1959) (collecting cases) (retaining federal court jurisdiction over a state eminent domain case).

no proceedings in state court under state law to guide the way.[13]

There is nothing so special about regulatory taking cases as to insulate them from federal court review.

Second, there is nothing so endemic to the concept of federalism to stand in the way of protecting basic aspects of the Bill of Rights. Indeed, in *Felder*, the Court was told that it should rule in the government's favor out of some respect for "equitable federalism," i.e., a belief that states needed to retain some measure of control over their own litigation. *Felder* rejected the idea, concluding strongly that "it has no place under our Supremacy Clause analysis." 487 U.S. at 150.

In other words, Section 1983, being a federal statute of uncommon strength, adopted by Congress for the specific purpose of restricting the ability of state and local government officials to impose on the rights of ordinary citizens, had to prevail. 487 U.S. at 153.

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[13] The Eighth Circuit later tried to reconcile *Williamson County* and *City of Chicago*, but found the outcome "anomalous." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2002). The Eighth Circuit concluded that how to resolve the resulting conundrum "is for the Supreme Court to say, not us." *Ibid.* Presumably, the Court understood that need when it granted certiorari here.

Williamson County's ripeness rule that has, for more than three decades, diverted legitimate constitutional claims away from the federal court system has no basis in history or precedent or constitutional exegesis.

CONCLUSION

Precedents are not cast away lightly. *Williamson County*, however, has not stood the test of time. For more than three decades, the judiciary has been hamstrung in its ability to properly adjudicate federal takings claims because of *Williamson County*. Lower federal courts have expressed frustration at their inability to adjudicate federal takings claims after *Williamson County*, with descriptions running the gamut from "odd" and "unfortunate" (*Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1306 n.5, 1307 n.8 (11th Cir. 1992)) to "draconian" (*Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995)), with one concluding that the situation presents "a Catch-22 for takings plaintiffs" (*Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118,127 (2d Cir. 2003)), and another describing the plaintiff as having "already passed through procedural purgatory and wended its way to procedural hell." *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283-84 (4th Cir. 1998).

It is time for the Court to eliminate the "ripeness" component of *Williamson County* that mandates seeking compensation for a regulatory

taking in state court under state law before seeking federal constitutional relief in federal court.

Respectfully Submitted,

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